DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

ERRATUM OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Due to a computer system malfunction, certain portions of the "Competitive Telecommunications Association Petition for Reconsideration" filed on May 26, 1998 in the above-referenced proceeding became corrupted and could not be filed with the Commission. Attached hereto is a corrected version of CompTel's filing, which incorporates a cover page, table of contents, summary and correct page numbering with the petition. No substantive changes were made to the arguments presented by CompTel, however. Please associate this corrected version with CompTel's filing.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: Steven A. Augustino

Robert J. Aamoth
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Genevieve Morelli
Executive Vice President
and General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

May 27, 1998

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION PETITION FOR RECONSIDERATION

Genevieve Morelli
Executive Vice President
and General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

May 26, 1998

SUMMARY

Although CompTel generally agrees with the "total service approach" adopted for carrier use of customer proprietary network information ("CPNI"), the Commission failed in several respects to implement rules that balance customer privacy interests with competitive concerns raised by use of CPNI. As shown below, the Commission made five basic errors in the rules adopted by the *Second Report and Order*:

First, the Commission erroneously interpreted section 272 to impose no additional obligations on BOCs than are present in section 222. The plain language of section 272 expressly prohibits BOCs from discriminating against competitors in providing any "information" to BOC section 272 affiliates – a term that plainly includes the more limited type of information constituting CPNI. Additionally, the structure of the Act unambiguously regulates the relationship between BOCs and section 272 affiliates more stringently than other carrier-affiliate relationships, placing restrictions that apply in addition to the general rules of section 222. Contrary to Congressional intent, the *Second Report and Order* writes section 272's information equality provision out of the statute. Consequently, the *Second Report and Order* grants the BOC's interLATA affiliate free reign to exploit a legacy of monopoly local exchange information unavailable to other interLATA competitors.

Second, although the Commission acknowledged that ILECs possess a *greater* potential for competitive abuse of CPNI due to their large customer base (¶ 193), the Commission completely failed to address this greater potential with rules tailored specifically to the ILECs. ILEC CPNI is different in kind than the CPNI possessed by other carriers, and ILEC access to CPNI poses unique anticompetitive dangers. In order to adequately address these

dangers, the Commission should adopt additional safeguards for ILEC use of CPNI over and above those mandated for all carriers under section 222.

Third, the Commission should bring the provision of customer premises equipment ("CPE") and information services within the total service approach for competitive (non-dominant) carriers. The Commission historically has not required non-dominant carriers to obtain CPNI waivers for CPE or information services, and the Commission's new rules burden competitive carriers without providing consumers any corresponding benefit.

Fourth, the Commission should reverse the Common Carrier Bureau's erroneous decision to allow BOCs to rely on *Computer III* authorizations to continue to use CPNI in certain instances. The *Computer III* rules, which were "replaced" by the new rules, do not provide the same level of protection of customer privacy interests as is provided by the section 222 rules, and authorizations were obtained in a different context from the new rules. Accordingly, there is no basis for concluding that prior *Computer III* authorizations were sufficiently "informed" to meet the requirements of the new rules. Instead, a BOC should proceed to obtain approvals from its customers, just as competitive carriers are required to do.

Fifth, the Commission imposed detailed system and internal tracking requirements on competitive carriers without an adequate record basis on which to conclude that carriers could implement the requirements. If the Commission does not provide carriers with additional flexibility to implement the new rules, the Commission must at a minimum issue a proper notice to make carriers aware of the Commission's desire to require computer systems modifications and to develop a reasonable record on the costs and burdens of CPNI tracking requirements.

TABLE OF CONTENTS

Page

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION PETITION FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its counsel, hereby petitions the Commission to reconsider portions of its *Second Report and Order* in the above-captioned docket.[1] Although CompTel agrees with the general outlines of the "total service approach" adopted in the *Second Report and Order*, the new customer proprietary network information ("CPNI") rules should be modified in several respects. Specifically, the Commission should:

(i) recognize that section 272 applies to all information transfers – including CPNI transfers – to section 272 affiliates;

(ii) establish affirmative rules to limit the incumbent local exchange carriers' ("ILEC") ability to misuse CPNI;

(iii) bring the provision of customer premises equipment ("CPE") and information services within the Commission's "total service approach" for competitive carriers;

---

[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, (rel. Feb. 26, 1998) ("*Second Report and Order*").

(iv) find that authorizations obtained under *Computer III* no longer are effective; and

(v) develop an adequate record basis prior to implementing computer systems modifications to track CPNI compliance.

Each of these areas of reconsideration is described in detail below.

I. THE COMMISSION'S ABOUT-FACE CONCLUSION THAT SECTION 272 IMPOSES NO RESTRICTION ON BELL OPERATING COMPANY ("BOC") CPNI TRANSFERS TO INTERLATA AFFILIATES CONTRADICTS THE PLAIN LANGUAGE AND STRUCTURE OF THE ACT

In December 1996, the *Non-Accounting Safeguards Order* correctly concluded that section 272's non-discrimination requirement, as applied to BOC provision of "information," includes CPNI; and therefore, a BOC must comply with both sections 222 and 272 when it provides CPNI to its interLATA affiliate. The *Second Report and Order's* abrupt reversal of this conclusion violates the plain language of section 272, contradicts the structure of the Act, and grants the BOCs' interLATA affiliates an insurmountable information advantage over competitive carriers.

A. The Commission's failure to apply non-discrimination standards to CPNI transfers between BOCs and BOC section 272 affiliates contradicts the plain language of section 272(c)(1) of the Act

Section 272(c)(1) specifically precludes BOCs from giving their affiliates discriminatory marketplace advantages – including information advantages – that result from the BOCs' monopoly legacies. Section 272(c)(1) provides that a BOC:

> may not discriminate between [the BOC] affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.[2]

[2] 47 U.S.C. § 272(c)(1).

By the plain language of the statute, then, section 272(c)(1)'s non-discrimination safeguards extend to *any information* that a BOC provides to its section 272 affiliate. This squarely extends to CPNI, which is "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service...."[3] Under the Act, CPNI is a subset of the broad category of "information" covered by section 272.

The Commission "must give effect to the unambiguously expressed intent of Congress."[4] That is precisely what the FCC did in December 1996, when it adopted the *Non-Accounting Safeguards Order*.[5] In interpreting the word "information" in section 272 (c)(1), the Commission "[found] no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) non-discrimination requirement."[6] Thus, the Commission concluded, as used in section 272(c), "the term 'information' includes, but is not limited to, CPNI...."[7]

Despite these conclusions, the *Second Report and Order* now finds an "apparent conflict" between sections 222 and 272.[8] "Should CPNI be deemed to be 'information' ... that would trigger application of section 272," the Commission commented, "then the BOCs would

---

3 47 U.S.C. § 222(f)(1).

4 *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

5 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2297 (1996) ("*Non-Accounting Safeguards Order*"), Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Report and Order, 12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al. v. FCC, et al.* No 97-1432, 1997 WL 783993 (D.C. Cir. 1997), *further recon. pending.*

6 *Non-Accounting Safeguards Order*, ¶ 222.

7 *Id.*

8 *Second Report and Order*, ¶ 158.

be unable to share CPNI with their affiliates to the extent contemplated by section 222."[9] The Commission resolves this perceived conflict by writing CPNI out of section 272's plain language. Section 272, the Commission now claims, does not impose on BOCs any CPNI obligations other than those contained in section 222.[10] This conclusion is patently in error and should be reversed on reconsideration.

Section 272's use of the broad term "information" without additional limitation does not create a "conflict" with section 222's regulation of CPNI, which simply is specific kind of information. Throughout the text of the Act, Congress has demonstrated its ability to limit the scope of the word "information" when Congress intended to do so. Indeed many provisions of the Act address specifically-tailored information obligations. For example, section 251(c)(5) establishes an ILEC's duty to provide competitors with "information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks."[11] Section 272(e)(2), is limited to "information concerning [a BOC's] provision of exchange access."[12] section 273(c)(4) obligates BOCs to provide interconnecting carriers with "information on the planned deployment of telecommunications equipment."[13] Even section 222 is limited only to information that relates to the quantity or nature of telecommunications services used by a customer.

By contrast, while Congress crafted language addressing limited types of information elsewhere in the Act, Congress broadly defined the BOCs' non-discrimination

---

9 *Id.*

10 *Id.*, ¶ 160.

11 47 U.S.C. § 251(c)(5).

12 *Id.*, § 272(e)(2).

13 *Id.*, §273(c)(4).

obligations with respect to their interLATA affiliates. Section 272(c)(1) places no limit on the type or kind of information that BOCs must make available to competitors under section 272(c)(1). As such, Congress' intent is clear: The BOCs may not discriminate between their section 272 affiliates and any other entity in the provision of any type of information, including CPNI. Any other interpretation of section 272(c)(1) violates the plain language of the Act and amounts to reversible error.

Adding weight to a broad construction of the term "information," as used in section 272(c)(1), is the sole exception Congress established to this requirement – section 272(g). section 272(g) provides guidelines for BOC and BOC affiliate joint marketing of one another's services, and, as a rule of construction, section 273(g)(3) specifically exempts joint marketing from the non-discrimination provisions of section 272(c)(1).[14] The existence of this explicit exception, but not of a similar exception for CPNI, supports an inference that CPNI is covered by the term "information."[15]

B. The Commission's failure to apply non-discrimination standards to CPNI transfers between BOCs and BOC section 272 affiliates contradicts the structure of the Act

"In ascertaining whether an agency's interpretation is a permissible construction of the statute, [one] must look to the structure and language of the statute as a whole."[16] To the

---

14 *Id.*, § 272(g)(3).

15 *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 958 (1991) (restating the general principle of statutory construction that "when two parts of a provision ... use different language to address the same or similar subject matter, a difference in meaning is assumed").

16 *National R.R. Passenger Corp. v. Boston & ME. Corp.*, 503 U.S. 407, 417 (1992).

extent that any ambiguity exists as to the plain meaning of the word "information" standing unconstrained in section 272(c)(1), the structure of the Act supports application of both sections 222 and 272 to a BOC's treatment of CPNI.

First, as the Commission recognized previously, section 222's obligations are not exclusive. In the case of information regarding alarm monitoring usage data, *both* sections 222 and 275(d) apply.[17] That is, the fact that alarm monitoring data may also be CPNI does not relieve LECs from complying with section 275(d)'s requirements. Instead, a LEC must satisfy its CPNI obligations generally, and also must satisfy section 275(d) when that CPNI contains alarm monitoring data. Sections 222 and 272 similarly work in tandem. There is nothing in the language, structure, or legislative history to suggest that section 222 was intended to "trump" section 272.

Second, section 272 clearly establishes different treatment for a BOC's interLATA affiliate. These unique restraints and conditions are derived from the relationship between a BOC and its section 272 affiliate and apply over and above the BOC's and the affiliate's obligations as carriers subject to the Act. In structuring the Act, Congress placed affirmative non-discrimination requirements on the BOCs and certain BOC affiliates, including an affirmative obligation to provide competitors with non-discriminatory access to all information (with CPNI being but a subset of that information) provided by the BOCs to section 272 affiliates.[18]

The structure of the Act demonstrates Congress' intent to limit deliberately the relationship between the BOC parent company and certain BOC affiliates. As this Commission

---

17 *First Report and Order*, ¶ 9; *see also Second Report and Order*, Statement of Commissioner Susan Ness Dissenting in Part.

18 47 U.S.C. § 272(c)(1).

has noted, "to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive."[19] To satisfy these concerns, Congress crafted section 272 to ensure that certain BOC affiliates do not gain marketplace advantages – including information advantages – over competitors by virtue of a section 272 affiliate's relationship with a BOC.

Indeed, "the structural and non-discrimination safeguards contained in section 272 ensure that competitors of the BOC's section 272 affiliate have access to essential inputs ... on terms that do not discriminate against the competitors and in favor of the BOC's affiliate."[20] Congress deliberately named "information" as one of the essential inputs that BOCs may not provide to section 272 affiliates, unless the BOCs offer the same information to others on non-discriminatory terms. Any other interpretation plainly contradicts the structure of the Act.

C. The Commission's failure to apply non-discrimination standards to CPNI transfers between BOCs and BOC section 272 affiliates gives BOC section 272 affiliates an insurmountable information advantage over competitors

It is beyond dispute that "section 272 is intended to ensure that BOCs do not give their affiliates a competitive advantage."[21] The Congressionally-mandated separate affiliates were designed to even the competitive playing field, so that a BOC affiliate would compete on the merits of its service, not on its superior relationship with the ILEC. Allowing BOC section 272 affiliates to obtain local exchange CPNI destroys that level playing field and imbues the

---

19 *Non-Accounting Safeguards Order*, ¶ 11.

20 *Id.*, ¶ 13.

21 *Second Report and Order*, ¶ 168.

affiliates with a decided information advantage over competitors.

BOCs have access to the CPNI of essentially every single telephone subscriber in their in-region service territories, giving them a much more valuable base of marketing information than could be available to any other carrier in their respective geographic regions. The BOCs provide local exchange services to virtually all telecommunications users, regardless of which service providers offer long distance or other services to the customer. This relationship gives the BOCs unparalleled access to usage information of virtually every telephone user in their territories. In short, the BOCs local service monopoly provides a window into every telephone user's telecommunications needs and usage.

Competitors lack any hope of matching the CPNI available to BOC affiliates under the Commission rules. Competitors simply don't have established business relationships with essentially every single potential customer as does each BOC. Nor do competitors have a window into the vast store of knowledge discernable from local exchange CPNI. Unlike the BOC's affiliate under the *Second Report and Order's* rules, competitors must obtain prior written approval to receive the local exchange CPNI of a customer, even where the customer subscribes to long distance or wireless services from the carrier. Competitors only have access to CPNI related to the services to which their immediate customers subscribe, but under the Commission's rules, BOC 272 affiliates have access to the CPNI of their immediate customers and to the universe of BOC local exchange customers. The Commission should not doubt that each BOC will exploit this advantage aggressively to gain market share in interLATA services. This is exactly the type of information advantage that Congress sought to guard against with section 272, but the Commission's CPNI rules essentially make this information protection a nullity.

In the *Second Report and Order*, the Commission appeared to be concerned that application of section 272 to CPNI would hinder legitimate "one stop shopping" efforts by a BOC or its affiliate. First, the Commission indicated that limiting BOC-to-272 affiliate CPNI transfers would deprive customers of the benefit of CPNI disclosure among affiliates.[22] Second, the Commission noted that limiting BOC-to-272 affiliate CPNI transfers would require maintaining separate customer service records for local and long distance offerings, impeding a customer's ability to receive convenient service. Both concerns are unfounded.

Section 272(c)(1)'s non-discrimination obligations address only a BOC's (*i.e.*, the local exchange incumbent's) provision of "information" *to* the interLATA affiliate. When information is flowing from the BOC to the affiliate, the BOC may not discriminate among entities in providing services, facilities, and information. This restriction appropriately targets a BOC's legacy advantage as a monopoly provider to prevent the new interLATA affiliate from profiting on an advantage denied other interLATA carriers. The section 272 affiliate, by contrast, faces essentially no limitations regarding what services, facilities, and information that it may provide to its BOC parent.[23] Thus, a section 272 affiliate may provide CPNI it obtains from its customers to the BOC parent so long as the affiliate has otherwise complied with the Commission's CPNI waiver requirements.

By allowing section 272 affiliates to provide information to their BOC parents, Congress promoted the customer convenience and control aspects of section 222 and prevented affiliates from obtaining an unfair information advantage over other interLATA carriers. The

---

22 *Id.*, ¶ 161.

23 Section 272(g)(2) prevents a BOC from marketing its long distance affiliate's service within a BOC's in-region states until the BOC receives authorization to provide in-region interLATA service within a state under section 271(d). *See* 47 U.S.C. § 272(g)(2).

section 272 affiliate requirements place BOC 272 affiliates in the same shoes as competitive entities. Congress recognized the anticompetitive danger of permitting certain BOC affiliates to have unbridled access to BOC resources, and Congress countered this danger with the one-way non-discrimination safeguards found in section 272(c)(1). These safeguards simply require certain BOC affiliates to collect information on their own – just like any competitive entity must – or share information received from the BOC parent with competitors. In other words, section 272(c)(1) in no way limits the convenience of customers' service, rather it limits only the information advantage that certain BOC affiliates would otherwise receive by virtue of being associated with a BOC.

In any event, to the extent section 272 does limit a BOC's ability to market services using CPNI, that limitation is compelled by the statute's express terms. This limitation is justified by the unique advantages – and clear dangers – that warranted structural separation in the first place. As Commissioner Ness noted in her dissent, Congress mandated that section 272 affiliates "operate independently."[24] To the extent this requirement forces the BOC affiliate to disgorge advantages it would otherwise receive from its association with the dominant local service provider, this result flows directly from Congress' express judgment to require structurally separated affiliates for certain activities.

II. THE COMMISSION'S DECISION TO PLACE THE SAME CPNI RULES ON THE ILECS AND ON COMPETITIVE CARRIERS FAILS TO RECOGNIZE THAT THE ILECS POSSESS CPNI THAT IS DIFFERENT IN KIND FROM THAT OF COMPETITIVE CARRIERS

Fundamental to the *Second Report and Order* is the Commission's conclusion that "Congress established a comprehensive new framework ... which balances principles of

---

[24] Statement of Commissioner Susan Ness Dissenting in Part at 1.

privacy and competition with the use and disclosure of CPNI and other customer information.[25] While CompTel agrees that "privacy is a concern which applies regardless of carrier size,"[26] the same conclusion does not apply to competitive concerns. Regarding competitive concerns, ILECs "have more potential for competitive abuse of CPNI because of their large customer base."[27] On reconsideration, the Commission should establish affirmative rules that limit the ILECs' ability to misuse CPNI to anticompetitive ends.

A. ILEC CPNI is different in kind from the CPNI possessed by competitors

ILECs have unmatched access to the CPNI of all customers, which creates unmatched potential for abuse. Each ILEC possesses CPNI of essentially every single customer in the ILEC's service territory. Through maintaining presubscription databases, which are used to identify each local exchange customer's long distance provider, ILECs have a rich source of interexchange service CPNI. Through virtual monopoly control of retail markets, ILECs possess expansive databases of local exchange CPNI. Through monopoly control of bottleneck facilities, such as loops and other unbundled network elements, ILECs have access to a vast array of CPNI on the customers that ILECs have lost to retail competition. In sum, ILECs possess unequalled databases of CPNI, which makes the CPNI within the ILECs' control different in kind than the CPNI possessed by competitors.

---

25 *Second Report and Order*, ¶ 14.

26 *Id.*

27 *Id.*, ¶ 193.

The *Second Report and Order* recognizes that competitive considerations continue to support regulation of CPNI.[28] Moreover, the Commission has stated that it is "cognizant of the danger[] ... that incumbent LECs could use CPNI anticompetitively."[29] In spite of this recognized danger, the rules offer no countervailing safeguards. On reconsideration, the Commission must address – not simply mention and ignore – the ILECs' unique access to CPNI and the heightened potential that exists for ILEC CPNI abuse, which arises from the ILECs' position as historical monopoly carriers, wholesale service providers, and gatekeepers of presubscription databases. These roles create unique conflicts of interest and anticompetitive dangers that warrant heightened CPNI protections.

B. The Commission should adopt bright-line rules to protect CPNI from ILEC abuse

The Commission must address anticompetitive concerns with additional regulations tailored to the ILECs' unique market position. Specifically, the Commission should adopt regulations that: (i) prohibit dominant carriers from sharing CPNI with non-dominant affiliates unless a customer consents in writing; (ii) require ILECs to obtain written consent to use CPNI to market services outside the existing total service relationship; and (iii) for a period of five years, require ILECs to provide more frequent notification of CPNI rights.

First, the Commission should preclude dominant ILECs from sharing CPNI with non-dominant affiliates, unless written customer consent is obtained. Requiring written customer consent will ensure that customers know exactly what their CPNI may be used for and

---

28 *Second Report and Order*, ¶ 182 n. 636 ("we disagree with parties to the extent they argue that competitive considerations no longer justify certain protective CPNI requirements").

29 *Id.*, ¶ 59.

limits the ability of the ILECs to leverage their existing relationships with customers to benefit new ILEC affiliates in competitive markets. Failure to implement a rule requiring written consent before transferring CPNI limits customers' ability to control their CPNI and harms competition by giving – at presumably no cost – ILEC affiliates an information advantage over competitors.

Second, the Commission similarly should require written consent to use CPNI to market services outside the existing total service relationship. Again, ILECs have an incredible information advantage over competitors because ILECs, as monopoly local exchange providers, have developed deeply entrenched relationships with customers. Written consent will ensure that customers do in fact understand their CPNI rights and are aware that withholding CPNI approval from an ILEC will in no way affect a customer's service.

Third, the Commission should require ILECs more frequently to notify customers of their CPNI rights during the transition to competitive markets. CompTel suggests that the Commission require an annual notification for five years. Requiring annual notification for five years will impose minimal cost on the ILECs, as ILECs already are providing CPNI notification. Additionally, notification would benefit consumers by ensuring that they know for what purposes the ILECs will use the customer's CPNI, by making consumers aware of their expanded CPNI rights under the Act, and by reinforcing the availability of competitive alternatives. Prior to the Act, consumers had no choice in selecting their local exchange provider. Any implied authorization to use CPNI emanating from this involuntary relationship is tenuous at best. To compensate for this, the Commission should require an affirmative, periodic notification of the ILEC customers' CPNI rights during this transition to competition.

In sum, ILECs have unique access to a wide variety of CPNI, including competitor CPNI. Because of these information disparities, the Commission has recognized that "competitive concerns may justify different regulatory treatment for certain carriers."[30] The Commission should implement the rules outlined herein to protect consumers and to minimize the effect of the ILECs' information advantages that result from their monopoly market positions.

There is ample authority in the provisions of sections 4(i), 201, 251(c), and 303(r) for the Commission to address these concerns beyond the general requirements imposed in section 222. These sections authorize the Commission to prohibit unjust or unreasonable practices and to adopt any rules it deems necessary or appropriate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[31] Indeed, as the Commission itself noted in the *Second Report and Order*, "[b]ased on the Act's grant of jurisdiction, the Commission has historically regulated the use and protection of CPNI by AT&T, the BOCs, and GTE ...."[32] Thus, the plain terms of the Act and the Commission's well-established authority to promulgate rules governing dominant-carrier use of CPNI indicate that the Commission has the power to implement CPNI rules that apply only to the ILECs.

III. THE PROVISION OF CPE AND INFORMATION SERVICES BY NON-ILEC CARRIERS SHOULD BE BROUGHT WITHIN THE TOTAL SERVICE APPROACH

CPE and information services should be brought within the "total service approach" for services provided by competitive carriers. Under the total service approach

30 *Id.*, ¶ 134.

31 *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

32 *Second Report and Order*, ¶ 15.

adopted by the Commission, carriers may use CPNI without approval to market or provision any telecommunications service within the scope of the existing customer-carrier relationship.[33] The Commission explained that customers expect a carrier to offer them new service plans or additional services within the same category of service to which the customer subscribed.[34]

With respect to related non-telecommunications services, such as customer CPE and information services, the Commission concluded that carriers must receive affirmative approval to use CPNI to market these services, regardless of the scope of the customer's telecommunications relationship with the carrier.[35] This rule is a step backward for competitive carriers and deprives consumers of the benefits of seamless telecommunications and related services. Additionally, this rule will act to slow the proliferation of advanced telecommunications services, such as advanced digital handsets.

On reconsideration, the Commission should reverse this rule as it applies to competitive carriers[36] and permit such carriers to count as within the "total service relationship" CPE or information services that are related to the underlying telecommunications services to which a customer subscribes. Such a rule will bring the benefits of competition to consumers while maintaining customer control over the use of CPNI outside the context of his or her existing relationship with the carrier.

Seamless marketing of telecommunications services and related CPE or information services benefits consumers within the existing service relationship with competitive carriers. As the *Second Report and Order* concludes, customers expect their carriers to offer

---

33 *Id.*, ¶ 56.

34 *Id.*, ¶ 59.

35 *Id.*, ¶ 71.

36 See Section II, *supra.*

them telecommunications services or pricing plans that are within the scope of their existing relationship with the carrier. Section 222(c)(1)(A)'s authorization to use CPNI in connection with the "provision" of the telecommunications service from which it is derived encompasses a customer's implied approval to use CPNI in offering other telecommunications services within the scope of the existing service relationship.[37]

The Commission acknowledges that the same is true for *non*-telecommunications services related to the telecommunications services to which the customer subscribes. Section 222(c)(1)(B) – which applies to "services necessary to, or used in, the provision" of a telecommunications service – "reflect[s] the understanding that, through subscription of service, a customer impliedly approves its carrier's use of CPNI for purposes within the scope of the service relationship."[38] Whereas section 222(c)(1)(A) authorizes use in connection with telecommunications services to which the customer subscribes, section 222(c)(1)(B) authorizes such use in connection with related non-telecommunications services.[39]

However, the *Second Report and Order* concludes that CPE and information services do not fall within the implied approval regarding non-telecommunications services. With regard to services provided by non-dominant competitive carriers, the Commission's conclusion erroneously construes the nature of the carrier-customer relationship and the language of section 222(c)(1)(B).

For many years prior to the *Second Report and Order*, carriers have marketed related equipment and information services in conjunction with the telecommunications services

---

37 *See Second Report and Order*, ¶ 32.

38 *Id.*, ¶ 134.

39 *Id.*, ¶ 45.

to which the customer subscribes. For example, competitive carriers frequently use customer information to identify those subscribers that could most benefit from the voicemail and voice messaging services. Non-dominant carriers market to customers with special needs all sorts of equipment, such as data modems, speed dialers, special handsets, and telephones. More recently, non-dominant carriers have used telecommunications usage CPNI to market to customers equipment necessary to providing frame relay and other advanced data services.

These activities by competitive carriers provide consumers with significant benefits, without any loss of privacy or customer control. CPE and information services used by or useful to the customer's existing telecommunications services are "within the scope of the service relationship" with that customer. Using CPNI to market these services does not change the nature of the customer-carrier relationship, nor does it expand the scope of the communications services offered by the carrier. In short, no cross-marketing of telecommunications services will result from use of CPNI to market related CPE or information services by a competitive carrier.

Although the Commission acknowledged that section 222(c)(1)(B) reflects implied authority to use CPNI in connection with non-telecommunications services, the Commission erroneously excluded CPE and information services from the scope of the authorization when provided by competitive carriers. The Commission's conclusion rests on an interpretation of services "necessary to, or used in, the provision of" a telecommunications service as meaning "essential to" the telecommunications service provided by the competitive carrier. This interpretation is not necessary to balance privacy and competitive concerns in the case of non-dominant carriers. Rather, in the case of non-dominant carriers, the Commission should interpret the phrase "necessary to, or used in, the provision" of a telecommunications

service as encompassing all services related to, and useful in connection with, the use of telecommunications services to which the customer already subscribes.

Such a reading is consistent with the statute's use of the disjunctive term "or," meaning that absolute necessity in connection with the provision of a telecommunications service is not required. Indeed, if a service such as voicemail is capable of being used in connection with the telecommunications service to which a customer subscribes, that service may be "used in ... the provision" of the telecommunications service. Accordingly, there is no reason to prohibit competitive carriers from using CPNI to provide related equipment or information services to the customer.

In fact, related CPE and information services are like inside wire maintenance and adjunct to basic services – two related offerings for which the *Second Report and Order* permits CPNI use. CPE and information services, like adjunct to basic services, are optional aspects of the service relationship. The products are helpful to receiving the full benefit of the telecommunications services, but are not required in order to use the services. Further, like maintenance of inside wire, CPE and information services are available from a number of unaffiliated providers and are not required to be obtained from the telecommunications carrier. Though the customer may find it beneficial to obtain the service from his or her telecommunications carrier, it is "useful" but not "necessary" to do so. Given these similarities, it is reasonable to conclude that customers expect their competitive carrier to offer related services such as these to them, and therefore, customers have given implied consent to carriers to use CPNI for marketing services, as required by section 222(c)(1)(B).

IV. CPNI AUTHORIZATIONS OBTAINED PURSUANT TO THE COMPUTER III RULES NO LONGER ARE EFFECTIVE

Prior to the 1996 Act, the BOCs had to obtain approvals to use CPNI pursuant to rules adopted in the *Computer III* proceeding.[40] Generally, these rules provided for default access to CPNI of residential and single line business customers and required affirmative approval only from multiline business customers. The rules provided for notification only to multiline business customers, but did not require specific identification of the uses to which the carrier may place CPNI.

In the *Second Report and Order*, the Commission "replaced" these prior CPNI rules with new rules adopted pursuant to section 222.[41] Because the rules were replaced, CompTel believes it is clear that the BOCs no longer may rely upon *Computer III* authorizations to use CPNI. Instead, the BOCs, like all other carriers subject to section 222, must obtain authorization pursuant to the methods permitted by the *Second Report and Order*. However, in a clarification order issued only two business days before reconsideration petitions were due, the Common Carrier Bureau concluded that the BOCs may continue to rely on *Computer III* authorizations received from business customers with more than 20 lines.[42] This conclusion is in error and should be reversed.[43]

---

40 *Computer III Phase I Order*, 104 FCC 2d 958, ¶ 260.

41 *Second Report and Order*, ¶ 181.

42 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order, DA 98-971 (May 21,1998).

43 Although the Bureau's order is reviewable by Application for Review filed 30 days after its release, 47 C.F.R. § 1.104, it would be more efficient to address the issue in this reconsideration proceeding along with the other reconsideration issues.

Of course, there should be no dispute that implied authorizations received pursuant to the *Computer III* regime do not satisfy the new rules. Section 222 requires express approval from customers.[44] As the Commission noted, there is no assurance that approval implied from a failure to restrict CPNI is an informed approval.[45] Authorizations received pursuant to the "opt-out" provisions of the *Computer III* rules do not satisfy these new rules and therefore are no longer valid.[46]

Similarly, it is clear that express approvals received from business customers under the old rules also are invalid, at least as applied to uses other than the marketing of CPE and enhanced services. The *Computer III* rules only addressed the marketing of CPE and enhanced services, not the cross-marketing of telecommunications services. Obviously, any approval received pursuant to these rules says nothing about the customer's preferences as they relate to the use of CPNI for other purposes, such as to market services outside the customer's existing relationship with the carrier. The Bureau correctly concluded that, whatever the significance of these prior approvals for CPE and enhanced services, they are not effective for other purposes.[47]

Nevertheless, the Bureau allowed the BOCs to rely on *Computer III* written approvals to market CPE or information services. This conclusion is inappropriate, however. A cornerstone of the new CPNI rules is the requirement that customers must give "informed

---

44 *Second Report and Order*, ¶ 94.

45 *Id.*, ¶ 91.

46 Conversely, however, the BOC should continue to honor the requests of any customers that exercised their prior rights to deny the BOC use of CPNI. A customer who returned a CPNI restriction under the *Computer III* "opt-out" rules should be presumed to continue to want to restrict CPNI under the new rules. Of course, nothing would preclude the BOC from seeking to obtain approval from such a customer after presentation of the required disclosures. *See id.*, ¶ 117.

47 *Clarification Order*, ¶ 10.